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532182—43——1

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 983

JOHN M. WHELAN & SONS, INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The special findings of fact, conclusion of law, and opinion of the Court of Claims (R. 55–91) and its order denying petitioner's motion for a new trial (R. 92) are not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on October 5, 1942 (R. 91; Pet. 1).[1] Peti-

[1] The transcript by a typographical error refers to the judgment as having been entered *December* 5, 1942.

tioner's motion for a new trial was overruled on February 1, 1943. The petition for a writ of certiorari was filed on May 1, 1943. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

CONTRACT PROVISION INVOLVED

Article 9 of the standard form Government contract here involved provides in relevant part that:

> *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. * * * If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the

> Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed the amount as set forth in the specifications or accompanying papers * * *. (R. 25–26.)

QUESTION PRESENTED

Whether, after terminating a contractor's right to proceed pursuant to Article 9 of a standard form Government contract subsequent to the date of completion fixed in the contract as extended, the Government is entitled, in addition to the extra cost of completing the work, to damages for delay and excess costs.

STATEMENT

Petitioner entered into a written contract with the United States for the construction of seven buildings for officers' quarters at Fort Monmouth, New Jersey, the work to be commenced on December 28, 1933, and completed on August 5, 1934, later extended until November 30, 1934 (F. 1, R. 57). The contract fixed liquidated damages in the amount of $25.00 a day for each calendar day of delay (R. 67).

Following a controversy between the parties as to the interpretation and application of certain labor provisions of the contract (F. 3, 4, R. 58–62), petitioner ceased all operations on November 12, and refused to resume work (F. 4, R. 61), abandoning the contract on December 3,

1934 (F. 5, R. 63). On December 10, 1934, the contracting officer, pursuant to the authority of Article 9 of the contract (R. 25–26), declared plaintiff in default as of December 4, 1934 (F. 4, R. 62).

The contracting officer advertised for proposals for the completion of the contract, bids were received, and on April 12, 1935, a contract for the completion of the work was entered into with Eastern Construction Company, Inc. (the "completion contractor"), in accordance with Article 9 of the original contract (F. 6, R. 64).

All work under the second contract was completed and accepted September 12, 1935 (F. 6, R. 64), the Government having proceeded with all reasonable and proper dispatch in completing the work (R. 90).

Petitioner brought suit in the Court of Claims to recover extra costs and damages from the United States, on account of allegedly wrongful termination of the contract and allegedly erroneous rulings of the Government's officers. The United States filed a general traverse (R. 52) and a counterclaim (R. 52–54) seeking recovery of the excess cost of completing the contract and the damages caused by petitioner's default and the consequent delayed completion of the work.

The court below held that petitioner was not entitled to recover any part of its claim, and dismissed its petition. That decision is not ques-

tioned in this proceeding. The court below further held that the Government was entitled to recover $22,525.56 on its amended counterclaim and entered judgment for the United States in that amount (R. 88).

ARGUMENT

Petitioner does not question that part of the judgment below which awards the United States $8,924.43, consisting principally of the excess cost of completion.[2] Petitioner assigns as error only the allowance to the United States of $13,601.00 (see Pet. 6) made up of:

(1) $9,340.40 as the proportional value of rental allowances to Army officers stationed at Fort Monmouth, N. J., between the date of petitioner's default (December 4, 1934) and the completion date of the work (September 12, 1935), incurred because of petitioner's failure to complete the contract in time;

(2) $4,160.73 as salaries to the Constructing Quartermaster and his employees for additional work performed by them during this period, by reason of petitioner's default; and

[2] The items not in dispute consist of: (1) $8,860.93, as the excess cost of completion (being the amount by which the partial payments made to petitioner and the payments made to the completion contractor exceeded petitioner's contract price) (R. 65, 66); (2) $15.50, as the cost of advertising for the completion contract; and (3) $48.00, as the cost of labor to protect materials at the site of the work between the date of petitioner's default and the date the completion contractor commenced work.

(3) $100 as damages accrued between the date fixed for completion (November 30) and the date of default (December 4)[3] (R. 67).

Petitioner argues that (1) by terminating petitioner's right to proceed under the contract, the Government waived its right to damages for delay in completion, and if it did not, then (2) the liquidated damages stipulated in the contract measure the right to recover (Pet. 7–12). There is no merit in either contention.

1. The questioned items are "excess costs" which Article 9 of the contract expressly stipulates shall be recovered in these circumstances. Article 9 provides that if the contractor fails to prosecute the work diligently or to complete it on time, the Government may terminate his right to proceed and may "prosecute the same to completion, by contract or otherwise." Petitioner concedes that the Government properly terminated the work pursuant to Article 9 and prosecuted it to completion on September 12, 1935 (Pet. 8). Article 9 further states that in such event "the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby" (see p. 2, *supra*). The term "thereby,"

[3] The $100 item was calculated upon the basis of the prescribed liquidated damages of $25 per day, but the court expressly found that item, not as liquidated damages, but as the actual damages sustained by the Government during this period, which were "at least equal to" $100 (R. 67).

reasonably interpreted, must refer to the contemplated train of events: i. e., the contractor's failure to prosecute or complete the work properly, the termination of his right to proceed by the Government, and the Government's taking over and prosecution of the work to completion. So construed, the term "excess cost," as applied to the items of recovery in this case, becomes synonymous with actual damage due to additional outlay. This construction finds support in several decisions holding that the costs of supervision during completion after the Government has terminated the contractor's right to proceed, are recoverable as "excess cost" under Article 9 (*United States* v. *Continental Casualty Co.*, 29 F. Supp. 598, 601 (E. D. La.), affirmed, 113 F. (2d) 284 (C. C. A. 5), certiorari denied, 311 U. S. 696; *Maryland Casualty Co.* v. *United States*, 93 C. Cls. 247). In the case at bar the court found that because of petitioner's default and the consequent delayed completion of the work, the Government had incurred costs totalling $13,601.13, composed of rental allowances for officers' quarters for the period between default and completion (during which quarters other than those to be available at the project had to be furnished to the officers),[4]

[4] A contractor on notice that a building is erected for a particular use is liable for the actual rental value as adapted to that use during the period of delay. *Prudence Co., Inc.* v. *Fidelity & Deposit Co.*, 297 U. S. 198, 206; *Trainor Co.* v. *Aetna Casualty Co.*, 290 U. S. 47; *Mazzotta* v. *Bornstein*, 104 Conn. 430, 133 Atl. 677.

salaries to supervising personnel for the additional work performed on account of the default, and damages apportioned for the four days between completion date and termination. These costs were in a real sense "excess costs" occasioned to the Government by the default and delayed completion. *Collins* v. *United States,* 93 C. Cls. 369, 384.

Even if the controverted items are deemed "actual damages for delay" rather than "excess costs"[5] under Article 9, nothing in the contract precludes their recovery. For breach of a construction contract by the builder's delay in completion of the contract, or by his abandonment of the work, necessitating its completion by others, the owner is entitled to actual damages incurred by him as a result of the delayed performance. *Prudence Co., Inc.* v. *Fidelity & Deposit Co.,* 297 U. S. 198, 206; *Massachusetts Bonding & Ins. Co.* v. *John R. Thompson Co.,* 88 F. (2d) 825 (C. C. A 8), certiorari denied, 301 U. S. 707. Petitioner apparently contends that this familiar principle is rendered inapplicable by the Government's termination of petitioner's right to proceed under Article 9 of the contract. But nothing in that provision evidences an intention on the part of the Government to relinquish the traditional and un-

[5] The court below lumped the recovery together as "excess cost of completion and the actual damages for delay," without differentiating sharply between items of cost and items of damage (*cf.* R. 67, 90).

questioned right to recover actual damage from a breach of contract. In the presence of a provision such as Article 9 the courts have found no difficulty in awarding actual damages to the owner, as the cases cited by petitioner itself will illustrate. *Fidelity & Casualty Co.* v. *United States,* 81 C. Cls. 495, 501–2; *Fidelity & Deposit Co.* v. *Robertson,* 136 Ala. 379, 34 So. 933, 944. Certainly damages for delay were very much within the contemplation of the parties, and the liquidated damage provision so attests (*cf. Robinson* v. *United States,* 261 U. S. 486; *Wise* v. *United States,* 249 U. S. 361, 366).

2. The liquidated damage provision in Article 9, which applies only where the Government permits the contractor to proceed after the time fixed for completion, cannot conceivably be read as a waiver of the owner's unquestioned right to actual damages from the contractor's outright refusal to complete the work. Such a stipulation is normally inserted to relieve the owner of the burden of proving the actual damages from delayed completion by a contractor (*cf. Wise* v. *United States, supra*); to give it any effect where the contractor defaults and does not complete the contract at all would reduce Article 9 to an abridgment of the Government's rights under general law instead of the enlargement which was patently intended. (*Cf. Six Companies of California* v. *Joint Highway Dist. No. 13,* 110 F. (2d) 620 (C. C. A. 9), reversed on other grounds, 311 U. S. 180.)

The contention advanced by petitioner, that if actual damages for delay are recoverable they must be limited to the liquidated damages of $25 per day stipulated in Article 9 (Pet. 11–12), ignores the clear language of Article 9, which imposes the liquidated damages only where the contractor is allowed to continue the work after default (see pp. 2–3, *supra*). Indeed, the court below has consistently construed that provision to preclude the recovery of liquidated damages where the Government terminates the contract for the contractor's default.[6]

CONCLUSION

The decision below is correct and is in accord with previous decisions of the court below and of this court. It is therefore respectfully submitted

[6] *Maryland Casualty Co.* v. *United States*, 93 C. Cls. 247; *American Employer's Ins. Co. of Boston* v. *United States*, 91 C. Cls. 231; *Commercial Casualty Ins. Co.* v. *United States*, 83 C. Cls. 367; *Fidelity & Casualty Co.* v. *United States*, 81 C. Cls. 495; see also *United States* v. *Cunningham*, 125 F. (2d) 28 (App. D. C.). We do not acquiesce in the view that termination *after* the date of completion has the effect of cancelling the liquidated damages which have accrued between completion date and date of termination. We believe the better view permits recovery of such accrued liquidated damages notwithstanding termination, as was done in such cases as *Continental Casualty Co.* v. *United States*, 113 F. (2d) 284 (C. C. A. 5), affirming 29 F. Supp. 598 (E. D. La.), certiorari denied, 311 U. S. 696; *United States* v. *Grogan*, 39 F. Supp. 819, 44 F. Supp. 871 (D. Mont.); 15 *Comp. Gen.* 409; *cf. Southern Pac. Co.* v. *Globe Indemnity Co.*, 21 F. (2d) 288 (C. C. A. 2).

that the petition for a writ of certiorari should be denied.

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